**Flat Dog Productions, Inc. *and* International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL–CIO, CLC.** Case 31–CA–24062

August 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On May 23, 2000, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge found that the Respondent unlawfully discharged striking employees for engaging in an economic strike. In its exceptions, the Respondent claims that even though it made statements indicating that the strikers had been discharged, other actions it took were inconsistent with actual termination. The Respondent contends that these other actions show that it did not, in fact, discharge the strikers.[3] We find no merit to the Respondent's argument.

On the morning of August 17, 1999,[4] the Respondent's employees began an economic strike. The initial response to the strike by Frank DeMartini, the Respondent's producer, was to treat the day as a nonwork day and to tell the strikers that "whoever wants to come back to work can." Later the same day, however, DeMartini drove to the picket line and announced that the strikers were terminated. On August 18 DeMartini offered $300 to strikers willing to cross the picket line. Several strikers accepted the offer and returned to work. In an August 19th letter to employees, DeMartini referred to the strikers as "former employees." In an August 19 letter to the Union, DeMartini wrote that the strikers had been "terminate[d for] refus[ing] to report to work."

In *Brunswick Hospital Center, Inc.,* 265 NLRB 803, 810 (1982) (citations omitted), the Board stated the standard to be applied in this case:

> In determining whether or not a striker has been discharged, the events must be viewed through the striker's eyes and not as the employer would have viewed them. The test to be used is whether the acts reasonably led the strikers to believe that they were discharged. If those acts created a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer.

Applying the test quoted above to these facts, we agree with the judge that the Respondent's conduct would reasonably have led the striking employees to conclude that they had been discharged. Initially, the Respondent told the strikers that they could return to work. That same day, however, the Respondent told the strikers at the picket line that they were terminated. The following day, the Respondent offered the strikers a cash bonus to return to work. Yet, the very next day, the Respondent wrote to both the strikers and the Union stating, respectively, that the strikers were "former employees" and that the strikers were terminated. Such a sequence of events would indicate to the employees "at the very least, that their employment status was questionable . . . [and] the burden of the results of that ambiguity must fall on the employer." *Brunswick,* supra at 810. Accordingly, we affirm the judge's finding that the Respondent discharged the strikers in violation of Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Flat Dog Productions, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way."

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify par. 2(c) of the recommended Order to provide standard remedial language and modify the notice accordingly.

[3] The Respondent additionally argues, based on cases such as *Redwing Carriers, Inc.,* 137 NLRB 1545, 1548 (1962), enfd. 325 F.2d 1011 (D.C. Cir. 1963), cert. denied 377 U.S. 905 (1964), and *Missoula Motel Assn.,* 148 NLRB 1477, 1479 (1964), that it is lawful for an employer to discharge employees and replace them in order to preserve efficient operation of its business. In *Torrington Const. Co.*, 235 NLRB 1540, 1541 (1978), overruled in part on other grounds by *Chambersburg County Market*, 293 NLRB 654 (1989), the Board rejected the argument that *Redwing* and other early cases were precedent for diminishing the distinction between discharge and replacement of strikers. The Board held "that there exists a substantial difference between replacement and discharge." *Torrington*, supra at 1541.

[4] All dates refer to 1999, unless otherwise indicated.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees engaged in a lawful economic strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole all the employees who engaged in an economic strike on August 17, 1999, for any and all losses incurred as a result of our unlawful discharge of them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of our striking employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

*Nathan Laks, Esq.,* for the General Counsel.

*Richard J. Frey* and *Richard W. Kopenhefer, Esqs. (McDermott, Will & Emery),* of Los Angeles, California, for the Respondent.

*Hope Singer, Esq. (Geffner & Bush),* of Burbank, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on March 27 and 28, 2000. On August 23, 1999, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL–CIO, CLC (the Union) filed the charge alleging that Flat Dog Productions, Inc., (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On December 23, 1999, the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees who were engaged in an economic strike against Respondent. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation, with an office and principal place of business in Los Angeles, California, where it was engaged in the production of a motion picture called Flat Dog. During the 12 months prior to issuance of the complaint, Respondent purchased and received in California, goods valued in excess of $50,000 directly from points outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that at all times material in the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

*A. The Facts*

Respondent began production of the motion picture Flat Dog in early August 1999. In the first or second week of August, certain members of the production crew contacted the Union seeking representation. The Union obtained signed union authorization cards from a majority of the crewmembers.

On August 17, without warning to Respondent, the Union placed a picket line at the entrance to Sable Ranch in Los Angeles County where Respondent was producing Flat Dog. The employees, with a few exceptions, did not cross the picket line. Rather the employees took turns picketing with signs which read:

Flat Dog Productions UNFAIR
Does Not Pay IATSE Wages and Benefits
IATSE, AFL–CIO

That morning, Frank DeMartini, Respondent's producer, told the employees that it was a "no call" day and that the employees could return to work. In the afternoon DeMartini announced at the picket line "The Company does not recognize that the crew is represented by the Union. The crew is in violation of their written contracts and they're all fired." Dale Paule, a representative of the Union asked DeMartini to repeat his statement and DeMartini did so. Paule and Barbara Jerrome, a representative of the Union's Local 600, each made a notation of DeMartini's statement. Paule then relayed to the employees what DeMartini had just said.[2]

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] Respondent's witnesses DeMartini and Dwayne Shattuck, production manager, denied that DeMartini said the employees were fired. The testimony of three credible witnesses, Paule, Jerrome, and employee Charles Lenz establish that Demartini did in fact state that the employees were all fired. Further, this credible testimony is corroborated by the notes taken by Paule and Jerrome shortly after the state-

On the following day, August 18, the striking employees voted to continue their strike against Respondent and to file unfair labor practice charges with the Board. The picket signs were changed to read:

Flat Dog Incorporated Unfair Labor Practices
IATSE AFL–CIO

Also on August 18, Joseph Aredas, an international representative of the Union, wrote DeMartini stating that the striking employees were protesting the Company's action in firing the striking crewmembers. Aredas further stated that the Union intended to represent the employees and that the Union wanted a collective-bargaining agreement.

On August 19 DeMartini wrote Aredas stating that the Union did not represent the former or current employees of Respondent. He called the strike a wildcat strike and stated that no one was fired for seeking union representation. DeMartini stated that certain employees were terminated for refusing to report to work in accordance with their employment agreements. He further stated, "we have subsequently replaced these people and we now have a full crew with whom we are very happy." DeMartini stated that he did not believe a union contract was in the Company's best interest. That same day, Aredas again wrote DeMartini offering to prove by a card check that the Union represented a majority of Respondent's employees. Also on August 19, Respondent distributed to "all employees and former employees" a memorandum written by DeMartini setting forth his version of the dispute with the Union. In this letter DeMartini states, "To begin with, all of the former employees of this corporation signed a written employment agreement laying out their obligations to the corporation. An unannounced wildcat strike without formal union representation clearly breaches that written employment and is clear legal justification for discharge."

On August 20 the parties met at a restaurant in Beverly Hills. The Union sought recognition for the crew of Flat Dog. Respondent rejected recognition for Flat Dog but offered recognition for a higher budget movie. However, the parties were unable to reach any kind of agreement. Thereafter, Respondent closed the production in California and finished the production of Flat Dog in Mexico.

### *B. Conclusions*

It is well settled that while an employer may permanently replace strikers, it may not terminate them because they engage in protected activity. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). The Board has held that the unlawful discharge of strikers is a violation of Section 8(a)(1) and (3) of the Act and is "a blow to the very heart of the collective-bargaining process" and "leads inexorably to the prolongation of a dispute." *Vulcan-Hart Corp*., 262 NLRB 167, 168 (1982), enf. granted in part and denied in part on other grounds 718 F.2d 269 (8th Cir. 1983); *Super Glass Corp.*, 314 NLRB 596, 597 (1994).

In the instant case, I have found that DeMartini terminated the strikers on August 17. The strike was an economic strike for union recognition at its inception. However, after DeMartini announced that the strikers were "all fired," the employees voted to continue their strike as an unfair labor practice strike and also to continue to seek recognition. Economic strikes are converted to unfair labor practice strikes where the employer's unfair labor practices are a factor in causing or prolonging the strike. *Gaywood Mfg. Co.,* 299 NLRB 697, 700 (1990). Further, the General Counsel must prove only that "the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage." Id.

The Board has held that "certain types of unfair labor practices by their nature will have a reasonable tendency to prolong the strike and therefore afford a sufficient and independent basis for finding a conversion." *C-Line Express*, 292 NLRB 638 (1989). The termination of strikers has a tendency to prolong strikes and by its very nature provides a per se basis for conversion. *F. L. Thorpe & Co.,* 315 NLRB 147, 149 (1994); and *Vulcan-Hart Corp*., supra.

In the instant case, it is clear that the unlawful discharge of the strikers converted the strike to an unfair labor practice strike. The Board has held that unlawfully discharged strikers, like unlawfully discharged employees, need not request reinstatement in order to activate the employer's backpay obligation. See *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). Thus, the discharged strikers are entitled to backpay from the date of the employer's unlawful action until the date he or she would have lawfully been laid off. Reinstatement is not an issue in this case as production of the movie has been completed.

I reject Respondent's argument that it replaced but did not discharge its striking employees. First, DeMartini stated that the employees were all fired. Thereafter DeMartini wrote that he terminated employees who refused to work in accordance with their employment agreements. DeMartini wrote that he had subsequently replaced these employees and that he was happy with his new crew. Third, DeMartini wrote the employees stating that the wildcat strike was legal justification for discharge. Thus, while DeMartini did state that strikers were replaced, he made that statement in the context that the employees had been terminated for engaging in a strike and that the employees had subsequently been replaced. Contrary to Respondent's argument, DeMartini's words and conduct did not communicate to the striking employees that Respondent was offering them reinstatement or the opportunity to return to work.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employees engaged in an economic strike.
4. Respondent's unlawful discharge of its striking employees converted the strike from an economic strike to an unfair labor practice strike.
5. The above-unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ment was made and repeated by DeMartini. Most important, the letters written by DeMartini on August 18 and 19 confirm that he terminated the striking employees on the August 17. DeMartini stated that the "former employees" were "terminated" for refusing to report to work and that a wildcat strike was a breach of an employment agreement and "legal justification for discharge."

REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

I shall recommend that Respondent make whole the employees who engaged in a strike on August 17, 1999, for any and all loss of earnings and other rights, benefits and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp.,* 231 NLRB 651 (1977), and *Isis Plumbing Co.,* 138 NLRB 716 (1962).

Respondent shall also be required to expunge any and all references to its unlawful discharge of the striking employees from its files and notify them in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc.,* 261 NLRB 472 (1982).

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Flat Dog Productions, Inc., Los Angeles, California, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees engaged in a lawful economic strike.

(b) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its employees who engaged in an economic strike on August 17, 1999, for any and all losses incurred as a result of Respondent's unlawful discharge of them, with interest, as provided in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any and all references to the discharge of its striking employees and notify them in writing that this has been done and that Respondent's discipline of them will not be used against them in any future personnel actions.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Los Angeles, California facilities copies of the attached Notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. Because Respondent has completed production of the movie Flat Dog, Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since August 17, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

[3] All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."